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IN THE

Supreme Court of the United States.

OF THE OCTOBER TERM, A. D. 1900.

No. 17,639.

THOMAS F. FARRELL ET AL.,
Plaintiffs in Error,
vs.
WEST CHICAGO PARK COMMISSIONERS,
Defendants in Error.

Error to Supreme Court of the State of Illinois.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

GEORGE W. WILBUR,
COUNSEL FOR PLAINTIFFS IN ERROR.

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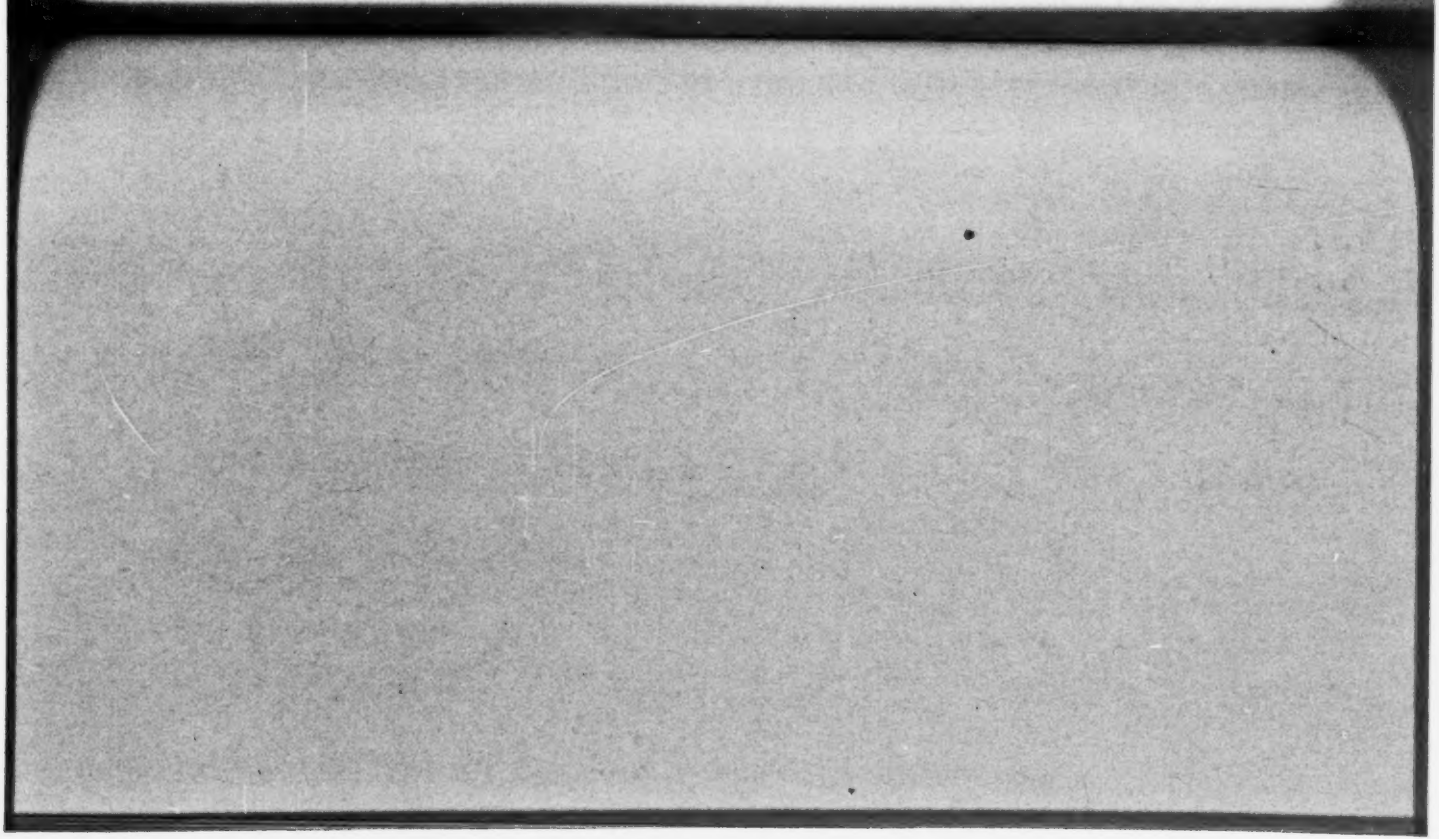

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No. 17,369.

THOMAS F. FARRELL et al.,
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vs.
WEST CHICAGO PARK COMMISSIONERS,
Defendants in Error.

Error to Supreme Court of the State of Illinois.

Reply Brief of Plaintiffs in Error.

MAY IT PLEASE THE COURT:

In our brief herein we attempted to discuss the points on which we rely, affirmatively, for a reversal of the judgments of the State courts, and in our oral argument we endeavored to avoid reference to such questions. After the case was on trial call, we received the brief of defendants in error, but were unable to prepare printed reply thereto before the case was actually called for argument. By the kind permission of your Honorable Court, we were allowed a certain time in which to file such reply brief.

One of the questions is:

I.

AS TO THE JURISDICTION OF THIS COURT.

Counsel for defendants in error have cited a number of authorities which they claim show that this Court, under the record, is without jurisdiction. Some of the cases cited we feel will not have the slightest bearing in determining the question of jurisdiction, while others have but little, if anything, in common with the matter under consideration.

We contend that the case is properly before the court, and we confidently expect that the whole record will be considered and that both the federal question and the question as to the merits of the case will be determined.

During oral argument questions were asked as to what was depended upon as a basis of jurisdiction. We then replied, and we now repeat, that we depend upon the objections which were filed in the county court at the time application was made for confirmation, which objections are set forth below. We also depend upon the assignments of error, which were attached to the record filed in the Supreme Court of Illinois. The first and second assignments of error are as follows:

> "1. The court erred in not sustaining the legal objections filed herein on behalf of said objectors as to said assessment, and as to each and every of said objections they say that the court erred in not sustaining the same.
>
> 2. The court erred in not holding that said assessment was void."

While, under the decisions of this Honorable Court, extracts of which appear herein, it does not seem to be

necessary that the federal question shall be brought into view by the most precise and exact language, yet the assignments of error above quoted, which appear on page 64 of printed record, clearly call to the attention of the Supreme Court that the trial court erred in not sustaining the objections which were before it.

The decisions of this court, to which we call attention, seem to determine that the question of jurisdiction is to be found by an inspection of the record, and if such inspection shows that a federal question must, of necessity, have been determined, although no reference is made to such question in the finding of the Supreme Court, then a federal question is involved, and this court has jurisdiction.

We wish to refer the Court to *Murray* v. *City Council of Charleston*, 96 U. S., 432, where we find the following:

> (440) "* * * The validity of the authority given by the State, as well as the validity of the ordinances themselves, was necessarily before the Court of Common Pleas when this case was tried; and no judgment could have been given for the defendant without determining that the ordinances were laws of the State, not impairing the obligation of the contracts made by the City with the plaintiff. And when the case was removed into the Supreme Court of the State, that court understood a federal question to be before it. One of the grounds of the notice of the appeal was, 'That such a tax is a violation of good faith in the contract of loans, impairs the obligation of said contract and is, therefore, unconstitutional and void.' It is plain, therefore, that both in the Common Pleas and in the Supreme Court of the State, a Federal question was presented by the pleadings, and was decided—decided in favor of the state legislation, and against the right the plaintiff claimed he has under the Constitution of the

United States. The city ordinances were in question on the ground of their repugnancy to the inhibition upon the States to make any law impairing the obligation of contracts; and the decision was in favor of their validity. Nothing else was presented for decision, unless it be the question whether the acts of the State legislature authorized the ordinances; and that was ruled affirmatively. The jurisdiction of this court over the judgments of the highest courts of the States, is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded, under the shield of state legislation, this court is authorized to interfere. The form and mode in which the federal question is raised in the State court is of minor importance, if, in fact, it was raised and decided. The Act of Congress of 1867 gives jurisdicttion to this court over final judgments in the highest courts of the State, in suits 'where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.' Not a word is said respecting the mode in which it shall be made to appear that such a question was presented for decision. In the present case it was necessarially involved, without any formal reference to any clause in the Constitution, and it is difficult to see how any such reference could have been made to appear expressly.

"In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the state court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a federal question was presented, but whether such a question was decided, and decided adversely to the federal right. Everywhere in our decisions it has been held that we may review the judgments of a state court when the determination or judgment of that court could not

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have been given without deciding upon a right or authority claimed to exist under the Constitution, laws or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised. In *Crowell* v. *Randall* (10 Pet., 368), it was laid down, after a review of almost all of our previous decisions, 'that it is not necessary the question should appear on the record to have been raised, and the decision made in direct and positive terms *in ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment. This case was followed by *Armstrong et al.* v. *The Treasurer of Athens Co.* (16 *id.*, 281), where it was held sufficient to give this court jurisdiction if it appear from the record of the state court that the federal question was necessarily involved in the decision, and that the court could not have given the judgment or decree which they passed without deciding it.

(443) "* * * Of course, the question is directly presented whether the ordinances are a justification; whether they can and do relieve the debtor from full compliance with the promise; in other words, whether the ordinances are valid and may lawfully be applied to the contracts. The court gave judgment for the defendant, which would have been impossible had it not been held that they have the force of law, notwithstanding the Constitution of the United States, and the Supreme Court affirmed the judgment. Our jurisdiction, therefore, is manifest."

In *Chicago Life Ins. Co.* v. *Needles*, 113 U. S., 574, it is stated:

(578) " * * * At the final hearing, it moved the court, upon written grounds, for a final decree in its behalf; one of which was, that the statutes of the State, under which these proceedings were

had, were in violation of the Constitution of the United States, in that they impaired the obligation of the contract between the State and the company, as well as of the contracts between the company and its policy-holders and creditors.

"This motion was denied, and a final judgment rendered perpetually enjoining the company from further prosecution of its business. From that judgment a writ of error was prosecuted to the Supreme Court of the State, where, among other things, was assigned for error the refusal of the court of original jurisdiction to adjudge that the said statutes of Illinois were in violation of the Constitution of the United States. The judgment of the inferior court was, in all things, affirmed by the Supreme Court of the State, and from that judgment of affirmance the present writ of error is prosecuted.

"The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which alone the auditor of state proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States, has been withheld or denied by the judgment below. And our jurisdiction is not defeated, because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must, therefore, be denied."

In *Furman* v. *Nichol*, 8 Wall., 44, we find the following:

(55) "The main question involved in this suit is of more importance than difficulty; but before we proceed to discuss it, it is necessary to consider the point of jurisdiction which is raised by the defendant in error. The circumstances under which this court is authorized to review the decisions of State tribunals has been so often considered and decided, that there is hardly anything left to do, but to apply the already well-settled legal principles, which govern this class of cases, to a particular record, in order to decide whether or not we have jurisdiction to hear and determine the matter in controversy. It would be useless labor to go through with the various adjudications of this court on this subject. It is enough for the purposes of this suit to say, that a cause can be removed from a state court into this court under the 25th section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right he claimed it gave him, was denied to him by the state court. It is urged that the particular provision of the Constitution, which the plaintiffs in error say has been violated in its application to their case, should be contained in the pleadings, but this is in no case necessary. If the record shows, either by express averment, or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand, then the jurisdiction of this court attaches. And it need not appear that the state court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment which it did.

"Testing the case at bar by these rules, it is apparent that it is properly here, and must be disposed of on its merits."

In *Murdock* v. *City of Memphis* (20 Wall.), 87 U. S., 590, we find the following:

(633) "The omitted clause of Act of 1789 declared that no other error should be regarded as a ground of reversal than such as appears on the face of the record and immediately respects the beforementioned questions.

"It is probable that in determining whether one of those questions was actually raised and decided in the state court, this court has been inclined to restrict its inquiries too much by this express limitation of the inquiry 'to the face of the record.' What was the record of the case was pretty well understood as a common-law phrase at the time that statute was enacted, but the statutes of the states and new proceedings in those courts have changed and confused the matter very much since that time."

* * * * *

(634) "But after all, the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of the inquiry; and while we are not prepared to fix any absolute limit to the sources of the inquiry under the new act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation."

* * * * *

"But when it appears that the Federal question was decided erroneously against the plaintiff in error, we must then reverse the case undoubtedly, if there are no other issues decided in it than that. It often has occurred however, and will occur again, that there are other points in the case than those of Federal cognizance, on which the judgment of the court below may stand; those points being of themselves sufficient to control the case.

"Or it may be, that there are other issues in the case, but they are not of such controlling influence on the whole case that they are alone sufficient to support the judgment.

"It may also be found that notwithstanding there

are many other questions in the record of the case, the issue raised by the Federal question is such that its decision must dispose of the whole case.

"In the two latter instances there can be no doubt that the judgment of the state court must be reversed, and under the new act this court can either render its final judgment or decree here, or remand the case to the state court for that purpose."

In *Davidson* v. *New Orleans*, 96 U. S., 97, quoted at considerable length in brief of counsel for defendants in error, we find the following:

(102) "* * * But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no state shall deprive any person of life, liberty or property without due process of law,' can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."

(107) Mr. Justice BRADLEY: "In the conclusion and general tenor of the opinion just read I concur. But I think it narrows the scope of inquiry as to what is due process of law more than it should do. * * * "But the court in that case (18 How., 272) expressly holds that it is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as the executive and judicial, power of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will."

(p. 276) "I think, therefore, we are entitled, under the fourteenth amendment, not only to see there is some process of law, but, 'due process of law,' provided by the state law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms and procedure in each case, according as the laws, habits, customs and preferences of the people of the particular state may require."

Spencer v. *Merchant*, reported in the 125 U. S., 345, is a special assessment proceedings brought by writ of error to the Supreme Court of the State of New York to review a judgment of that court for the defendant in regard to the validity of an assessment for regulating, grading and paving a certain street. In relation to the question of jurisdiction as applied to the case under consideration, I wish to call the attention of the court to the following:

(352) "The question submitted to the Supreme Court of the State was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881, was unconstitutional and void because it was an attempt by the legislature to validate a void assessment, without giving the owners of the land assessed an opportunity to be heard upon the whole amount of the assessment. He thus directly, and in apt words, presented the question whether he

had been unconstitutionally deprived of his property without due process of law, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, as well as of art. 1, sec. 7, of the Constitution of New York; and no specific mention of either constitutional provision was necessary in order to entitle him to a decision of the question by any court having jurisdiction to determine it. The adverse judgment of the Supreme Court, affirmed by the Court of Appeals of the State, necessarily involved a decision against a right claimed under the Fourteenth Amendment to the Constitution of the United States, which this court has jurisdiction to review. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 116, 142; *Murray* v. *Charleston*, 96 U. S., 432, 442; *Furman* v. *Nichol*, 8 Wall., 44, 56; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S., 574, 579.

"The jurisdiction of this court, as is well understood, does not extend to a review of the judgment of the State court, so far as it depended upon the Constitution of the State. *Provident Institution for Savings* v. *Jersey City*, 113 U. S., 506, 514. "Yet, as the words of the two constitutions are alike in this respect, the decisions of the highest court of the State upon the effect of these words are entitled to great weight."

As stated in oral argument, the Constitution of the State of Illinois contains a provision similar to the provision which is a part of the fourteenth amendment to the Constitution of the United States.

The 9th objection found on page 11 of printed record states, in effect, that the act under which the petition is filed, approved June 24, 1895, and in force July 1, 1895, is not in accordance with the Constitution of the State of Illinois, and is therefore void.

The 17th objection on page 12 of printed record, states:

"That there is no statute or provision of law in

force in the State of Illinois authorizing the West Chicago Park Commisisoners to make a special assessment for any improvement whatever; that the petition herein and the assessment filed therewith are for a special assessment for the cost of said improvement, and made to be levied upon all property benefited and not upon all property abutting upon said improvement, and such proceedings are therefore void."

The 24th objection on page 13 of printed record states:

" * * * That said special assessment is void because it is not levied in accordance with any ordinance providing for said special assessment and because the ordinance which is the basis of said special assessment has been declared void; that said ordinance upon which said improvement is based is unconstitutional and void because it provides for several distinct and independent improvements based upon altogether different and distinct acts of the legislature; that it is unreasonable and oppressive; that said assessment is void because it appears from the face of the petition that the only ordinance in any manner specifying the nature, character, locality and description of the improvement was an ordinance passed by the town of West Chicago and not by the West Chicago Park Commissioners, and that said ordinance has been declared absolutely null and void by the Supreme Court, and no valid estimate or valid assessment could be based thereon. * * *"

Similar objections, but for different property, are found on pages 14 and 15 of printed record.

The 11th additional objection on page 19 of printed record is as follows:

"The petition and proceedings herein are insufficient and void because they are contrary to the Constitution of the State of Illinois, because the provisions of the statute under which such petition is filed is retroactive and because such petition and the

proceedings herein put clouds upon the titles to the property of these objectors without due process of law, and because said petition and the proceedings herein are in other respects contrary to the Constitution of the State of Illinois and the laws thereof."

The 12th objection on the same page is as follows:

"The statute under which the present proceedings are being carried on is contrary to the Constitution of the United States and in conflict with section 10 (first) of article 1 thereof."

The reference to section 10 of article 1 contained in the foregoing objection, was inserted inadvertantly, as stated in oral argument. It is claimed, however, that the remaining part of the objection refers generally to the Constitution of the United States.

As stated herein, section 2 of article 11 of the Constitution of Illinois contains the following:

"No person shall be deprived of life, liberty or property without due process of law."

The fourteenth amendment to the Constitution of the United States which is so frequently called to the attention of your Honorable Court, is, in part, as follows:

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It will be seen that the above provision of the Constitution of Illinois and the fourteenth amendment are substantially in the same language, and we feel we are justified in asking your Honorable Court to apply the rule which seems to be laid down in the case of *Spencer* v. *Merchant, supra.*

In the objections above referred to are several refer-

ences to the Constitution of Illinois, and in the 11th objection is found the expression, "without due process of law."

The opinion in the *Spencer* case seems to be a full discussion of the merits of the case and the decision is based thereon. The finding of the lower court was affirmed by this court, MR. JUSTICE MATTHEWS and MR. JUSTICE HARLAN dissenting.

The petition for citation, which appears on page 73 of printed record, contains the following:

> "Now come (the plaintiffs in error, naming them) and show to the chief justice of the Supreme Court of the State of Illinois that in the record, and also in the rendition of the judgment in the above-entitled cause, lately pending in the Supreme Court of the State of Illinois, between Thomas F. Farrel *et al.*, appellants, and The West Chicago Park Commissioners, appellees, and in which final judgment was rendered against said Thomas F. Farrell *et al.*, appellants, on the 7th day of December, 1899, it appears in the record now remaining in the Supreme Court of Illinois that certain rights and privileges were claimed under the Constitution of the United States by said Thomas F. Farrell, *et al.*, appellants, and that said Supreme Court of the State of Illinois erroneously decided against said rights and privileges of said Thomas F. Farrell *et al.*, appellants, which were specially set up and claimed under said Constitution; and, further, that the validity of the authority exercised by said State of Illinois, was drawn in question in a suit by said Thomas F. Farrell *et al.*, appellants, on the ground that said authority was repugnant to the Constitution of the United States, and the decision of said Supreme Court of Illinois was in favor of the validity of said authority so exercised; from all of which said Thomas F. Farrell *et al.*, appellants, allege that it appears in the said record and proceed-

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> ings in said suit manifest error has occurred to the great damage of said Thomas F. Farrell *et al.*, appellants."

This petition was allowed by the Chief Justice of the Supreme Court of Illinois, as appears by an order set out on page 75 of printed record, which is in part as follows

> "Upon motion of George W. Wilbur, attorney for appellants, and upon filing a petition for writ of error and an assignment of errors, it is ordered that a writ of error be, and hereby is, allowed, to have reviewed in the Supreme Court of the United States, the judgment heretofore entered herein, and that the amount of the bond in said writ of error be and hereby is fixed at the sum of five hundred dollars ($500.00)."

This order was signed by the Chief Justice of the Supreme Court of Illinois.

On oral argument we showed, by our brief which was filed in the Supreme Court of Illinois, that the question as to the fourteenth amendment to the Constitution of the United States, was brought directly before the court. We read from such brief substantially the following:

> "The proceedings herein are contrary to the Constitution of the State of Illinois. Section 2, Article 2, says: 'No person shall be deprived of life, liberty or property without due process of law.'" * * *
>
> "The fourteenth amendment to the Constitution of the United States is in substantially the same language, and there are numerous authorities construing its meaning, which will not be cited, as they will be brought to your attention by counsel for other objections in other appeals in the same proceedings."

From the petition for rehearing, to which we also referred, we read substantially the following:

"The provision of the fourteenth amendment to the Constitution of the United States is as follows: 'Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.'

"The Supreme Court of the United States, in passing upon this amendment in a case taken from a State court, has held that where, *by the decision of the court*, property of a citizen is taken without just compensation, the Constitution of the United States is violated, although the statute of the State provides for such compensation. *Chicago, B. & Q. R. R. v. Chicago*, 166 U. S., 226."

From what is shown herein, it seems to us that the only conclusion to be drawn was that a federal question, arising under the fourteenth amendment to the Constitution of the United States, was before the Supreme Court of Illinois, and that such question was decided adversely to the plaintiffs in error herein. To give any other construction is to presume, as it seems to us, that the Chief Justice of the Supreme Court, in allowing the writ, acted without due consideration, and in disregard of the duties imposed upon him, when such application was made.

We feel warranted in anticipating that your Honorable Court will conclude that a federal question was before the trial courts, and that an adverse decision thereof denied to the plaintiffs in error herein the privileges and immunities claimed by them under the Constitution of the United States.

II.

AS TO AN ASSESSMENT AGAINST CONTIGUOUS PROPERTY.

This point was discussed somewhat in the original brief, but we wish to refer to a paragraph of the opinion herein, which appears at the end of page 69 of printed record, and is as follows:

> "The validity of the assessment generally is questioned because the original ordinance limited the assessment to contiguous property, while the new ordinance provides for an assessment upon all property benefited. If that objection would be available, it would only be to an owner whose property was not included in the terms of the original ordinance, and counsel has not made it appear that any of the appellants' property is so situated. If the property of appellants is contiguous to the improvement they could not be prejudiced by a new assessment-roll covering a larger district, by which other property-owners are made to contribute to the expense."

Our argument before the Supreme Court, as must be inferred, was to the effect that the Act of 1895, under which the present proceedings were instituted, was unconstitutional and void, and contrary to the Statutes of Illinois, because it provided for a special assessment, while the original proceedings, under which the improvement was constructed, provided for a special tax; that the laws of Illinois require that where a new assessment is made, it shall be in substantially the same form as the original assessment.

Art. IX., Cities, etc., § 48, is as follows:

> "If, from any cause, any city or village shall fail to collect the whole or any portion of any special as-

> sessment which may be levied, which shall not be canceled or set aside by the order of any court, for any public improvement authorized to be made and paid for by special assessment, the city council or board of trustees may, at any time within five years after the confirmation of the original assessment, direct a new special assessment to be made upon the delinquent property for the amount of such deficiency, and interest thereon from the date of such original assessment, which assessment shall be made, as near as may be, in the same manner as is herein prescribed for the first assessment." * * *

Section 20 of the act of 1895, under which the present proceedings are being carried on, is, in form, practically the same as the section above quoted in part, except that it does not limit the proceedings to the same property, neither does it require that the assessment "shall be made as near as may be in the same manner as herein prescribed for the first assessment." The contention is that the first assessment was confined to contiguous property, while the present assessment is against all property benefited. For this reason we claim that the present proceedings are contrary to law.

An assessment against property generally is very different from an assessment against abutting property, and whether or not the plaintiffs in error herein are prejudicially affected by the change in the character of the assessment is not the question, but the point is that the assessment is void, because it is contrary to the provisions of the statute, and if it be illegal, then only one conclusion can be reached, and that is, that the property of plaintiffs in error should not be subjected to the penalties of the assessment.

We argued on this theory, that is, that a special as-

sessment could not be made to collect for work done under a special tax proceedings which had been defeated. If a special assessment had been made, providing such, of course were possible, then the boundaries of the property involved in such assessment would have been extended, so as to include all property benefited, and thereby the assessment against property abutting on the improvement would have been proportionately diminished. The paragraph of the opinion set forth above, shows that the assessment was made, however, against the same property involved in the original assessment, notwithstanding the requirements of section 20 of the statute set forth herein.

We will admit that we would not be prejudiced "by a new assessment-roll covering a larger district, by which other property owners are made to contribute to the expense," and that is the point upon which we are now insisting, that is, that the assessment roll was too restricted, and thereby that it is contrary to the laws of Illinois, under which it is made.

Loch v. *Trustees of Columbia Tp.*, 91 Fed. Rep., p. 37, is a case in which the question of a frontage assessment is discussed, and many authorities are cited bearing thereon. Such authorities, are decisions of this court and of state and federal courts. The decision cites the case of *Norwood* v. *Baker*, 19 Sup. Ct., 187. The syllabus of the *Loch* case contains the following:

"A statute providing for the assessment of the entire cost of a public improvement on abutting property, by the front foot, without reference to special benefits, rests the assessment on an illegal basis, and is void as in contravention of the provision of the fourteenth constitutional

amendment that private property shall not be taken without due process of law."

Fay v. *City of Springfield*, 94 Fed. Rep., 409, is a bill in equity to enjoin the collection of special taxes assessed against lots fronting on Commercial street, in the city of Springfield, Missouri.

Lyon v. *Town of Tonawanda*, 98 Fed. Rep., 361, is a special assessement proceedings, and the decision is based largely upon the authority in *Village of Norwood* v. *Baker*, 172 U. S., 269.

The syllabus is in part as follows:

"An assessment made pursuant to a state law, for grading and paving a highway, which apportions the entire cost of such improvement upon the abutting land according to the foot rule, without regard to the size and value of the parcels or the special benefits accruing therefrom, is in violation of the 5th and 14th amendment to the Constitution of the United States."

In each of the foregoing authorities is a liberal discussion of the questions relating to frontage assessments. Each case refers to the Norwood case as the basis, largely, for the conclusion reached. An inspection of the text of these opinions might be to the advantage of the plaintiffs in error herein.

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III.

AS TO THE CONSENTING PETITION.

The act of 1873, under which the original proceedings were instituted, and the improvement was constructed, provides "that no improvement or sewer shall be made or constructed under the provisions of this section, except upon the petition of the owners of a majority of the land fronting on the proposed improvement or sewer." (Original brief, page 13.)

The petition for the present proceedings states: "That your petitioner was requested and authorized to undertake and proceed with said improvement by a petition duly made in writing by the owners of a majority of the land frontage on the proposed improvement, as required by said act of May 2, 1873." No mention is made of a consenting petition in the ordinance, which is the basis of this proceeding. The original ordinance was offered in evidence on the hearing, over the objection and exception of counsel for plaintiffs in error herein, and it appears on page 25 of printed record. The ordinance contains the following:

> "Whereas, said Board of West Chicago Park Commissioners have also submitted to the corporate authorities of the town of West Chicago a petition of the owners of a majority of the land fronting on the said proposed improvement, duly verified by their engineer; and,
>
> "Whereas, the corporate authorities of the town of West Chicago have found by inspection that said petitions contain the duly authenticated signatures of the owners of a majority of the land fronting on Douglas park, or Douglas boulevard, from the

> south line of Garfield Park to the west line of Douglas Park, as provided by law; * * * "

The bill of exceptions does not show that the petition referred to was offered in evidence, although plaintiffs in error insisted that such consenting petition was jurisdictional. This point appears in the opinion on page 69 of printed record, which adopts the opinion in the *Lombard* case, known in the Supreme Court of Illinois as *Cummings v. West Chicago Park Commissioners*, where it is stated:

> "The ordinance recites that said corporate authorities, upon such official investigation, found the petition contained the signatures of the owners of a majority of the land fronting on said Douglas boulevard so proposed to be improved. This recitation, we think, properly receivable in evidence as *prima facie* proof of the facts recited."

We contend that the Supreme Court erred in its findings in regard to the consenting petition, and that such findings are contrary to the well-established principles of law, which are to the effect that each party is required to introduce the best evidence; that the best evidence as to this proposition would have been the consenting petition itself, and in its absence, or in the event of its loss, the park commissioners should have been required to show a reason for not presenting it, and thereafter to establish its contents by secondary evidence. We claim that the action of the Supreme Court in this matter has resulted in depriving the plaintiffs in error of their just rights under the laws of the State of Illinois.

IV.

AS TO CHANGE IN THE CHARACTER OF THE IMPROVEMENT, AND AS TO THE ACTUAL COST THEREOF.

We wish to call the attention of the court briefly to the affidavit which was presented on the motion for a new trial, and which appears on pages 56 to 61 of printed record. This is the affidavit of Mr. Dorr, a civil engineer, who constructed the boulevard referred to in this proceeding. He shows, by his affidavit, and by plats, which are attached thereto, that material changes were made in the construction of the improvement: that at the intersection of the two arms of the improvement a very substantial change was made: that the center lawn on the north and south branch of the boulevard was reduced from 130 feet, as provided for in the original ordinance, to 120 feet; that the additional ten feet were added to the side lawn west of said center lawn, making such side lawn twenty-two feet in width instead of twelve feet. This change undoubtedly resulted in great benefit to the owners of property on the west side of the north and south branch of the boulevard, and also to an equal amount of damage to the owners of property on the east side of the north and south branch of said boulevard.

The trial court should have allowed a new trial under this showing, as we contend, and the Supreme Court should have set aside the finding of the County Court for the same reason.

The Supreme Court of Illinois has held that the improvement must be constructed in substantial compliance with the ordinance relating thereto.

In *Church* v. *The People*, 174 Ill., 366, it is held (369):

"The position of appellants that exact and literal compliance with the terms of an ordinance is necessary in order to fix the liability of the property holder to pay the assessment is not tenable, nor is the case of *Rossiter* v. *City of Lake Forest*, 151 Ill., 489, authority in support of that contention. In that case we said (p. 493): 'Unquestionably the ordinance is the authority for and the basis of a special assessment for a local improvement, and the work must conform *substantially* to the nature, character, locality and description given in the ordinance; and any deviation therefrom which renders the improvement *less beneficial* to the property assessed should entitle the owner to relief against the assessment. Any *such* alteration, however slight, becomes to the owner a substantially material change.'"

Page 371:

"But when, as in this case, the applicant for judgment and order of sale admits that since the adoption of the ordinance and the rendition of the judgment of confirmation a change in the location of the improvement has been ordered and made, and that the assessment for which he asks judgment is to be applied to the payment of the expenses of an improvement confessedly not located in exact accordance with the provisions of the ordinance, the question legitimately arises whether the ordinance and judgment of confirmation are properly applicable to the sewer as constructed. We conceive it to be the duty of the court, in such a case, to require of the applicant it be proven that the location of the sewer is, in every substantial and material point of view, within the proper construction of the terms of the ordinance upon which the assessments were estimated, and the judgment of confirmation proceeded."

Cooley on Taxation, page 672, says:

> "In general no defense to an assessment that the contract for work has not been performed according to its term is allowed, but this doctrine must be confined within its proper limits. It cannot be extended to cover a case in which the authorities, after contracting for one thing, have seen fit to accept something different in its place, for if this might be done, the statutory restraint upon the actions of local authorities in these cases would be of no more force than they should see fit to allow.'"

It seems to us that the case at bar comes clearly within the reasoning of the above authority, and that a new trial should have been granted. Questions were asked Dorr on the hearing as to the construction of the boulevard at the intersection of the two branches, and on objection, he was not permitted to answer. (Printed record 49.) If a municipal authority can construct an improvement, such as the one in question, without regard to the forms of law and the requirements of its own ordinances, then, it seems to us, that the necessity for any restrictions upon it disappears, and by virtue of its office it has a license to assess the property within its control in such manner as it may desire, and owners are powerless to interpose any successful objection thereto.

The estimate of the cost of the improvement, which was made, by the way, after its entire completion, as shown on page 9 of printed record, is $250,207.20.

Mr. Dorr, in his affidavit, and on page 61 of printed record, states:

> "This affiant further states that from his best knowledge, information, and belief in regard to the cost of said improvement, provided for by said ordinance, plans, and specifications, and upon the careful examination of his own estimates made at the

> time and from certain records and documents of the petitioners herein, the entire cost of said boulevard improvement so provided for in said original ordinance, plans and specifications, exclusive of engineering, surveying and inspection, did not exceed the sum of $195,239.21."

The unverified estimate of commissioners is	$250,207.20
The sworn estimate of Dorr is	195,239.21
Excess of estimate over cost, as shown by affidavit of Dorr	$ 54,967.99

The difference above shown is about one-fifth of the entire cost of the improvement, and the trial court as well as the Supreme Court, should have given the matter consideration and granted a new trial.

This showing was made upon an application for judgment of confirmation, while in the *Church* case the objection was raised upon application for judgment of sale. In the latter case the objection was entertained, while it was without force in the case at bar.

To have discovered the change in the improvement within time so as to have the benefit thereof, as intimated in the opinion of the Supreme Court herein, would have called upon the plaintiffs in error to watch the work of construction during the whole period thereof, and if there was a variance from the terms of the ordinance they could have taken advantage of it on the hearing, by proper proof. In other words, the plaintiffs in error should have doubted the park commissioners, and should have presumed that they would violate their own ordinances. Possibly the plaintiffs in error ought to have so acted, but unfortunately for them, their faith in the park board was greater than their business discretion.

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There is certainly no consideration passing to the owners of property assessed in this proceeding for the excess of the assessment over the cost of the improvement, as set forth above. In the absence of any showing to the contrary, we may be justified in presuming the cost as fixed by Dorr to be correct.

Conclusion.

We have extended the foregoing far beyond the boundaries originally intended, and by so doing we trust we have not trespassed too largely upon the valuable time of the court. We sincerely hope the cause of the plaintiffs in error has been brought before the court in such a manner as may justify a finding that will be favorable to their wishes.

Respectfully submited.

George W. Wilbur,
Counsel for Plaintiffs in Error.